

3

# SUPREME COURT OF THE UNITED STATES

## MANUEL COSTA v. UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 91-1849. Decided October 13, 1992

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom JUSTICE O'CONNOR joins, dissenting.

Petitioner Costa was convicted on various drug trafficking charges and sentenced to 60 years in prison. The district court ordered that he would not be eligible for parole until he served one third of his sentence (20 years). Before the Eleventh Circuit, petitioner argued that this latter provision violated 18 U. S. C. § 4205(a), which states that the maximum term of imprisonment prior to parole eligibility generally is (1) one-third of a sentence for a term of years, or (2) ten years of a life sentence and of a sentence of more than 30 years.

The Court of Appeals rejected this argument, relying on 18 U. S. C. § 4205(b)(1), which provides that a district court may "designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court." *United States v. Costa*, 947 F. 2d 919 (CA11 1991).

The Courts of Appeals have interpreted the interplay between subsections (a) and (b)(1) of the statute in conflicting ways. In holding that § 4205(b)(1) authorizes the sentencing court to disregard the 10-year ceiling for parole eligibility in § 4205(a), the Eleventh Circuit joined the Fifth, Ninth, Eighth and Tenth Circuits. See *United*

298

*States v. Varca*, 896 F. 2d 900, 905-906 (CA5), cert. denied, 111 S. Ct. 209 (1990); *United States v. Gwaltney*, 790 F. 2d 1378, 1388-1389 (CA9 1986), cert. denied, 479 U. S. 1104 (1987); *Rothgeb v. United States*, 789 F. 2d 647, 651-653 (CA8 1986); *United States v. O'Driscoll*, 761 F. 2d 589, 595-598 (CA10 1985), cert. denied, 475 U. S. 1020 (1986); see also *United States v. Berry*, 839 F. 2d 1487 (CA11 1988), cert. denied, 109 S. Ct. 863 (1989). Firmly to the contrary are the First, Third, Sixth and Seventh Circuits, which have held that § 4205 imposes a 10-year maximum before parole eligibility. Under this view, the purpose of subsection (b) was to allow judges to *reduce*, not to *extend*, the pre-parole eligibility period. See *United States v. Castonguay*, 843 F. 2d 51, 56 (CA1 1988); *United States v. DiPasquale*, 859 F. 2d 9, 13 (CA3 1988); *United States v. Hagen*, 869 F. 2d 277 (CA6), cert. denied, 109 S. Ct. 3228 (1989); *United States v. Fountain*, 840 F. 2d 509, 521 (CA7), cert. denied, 109 S. Ct. 533 (1988).

Although the statute was repealed as of November 1, 1987, by the Sentencing Reform Act of 1984, it remains applicable to crimes committed before that date. As this case and others illustrate, the issue continues to arise. See *United States v. Faulkenberry*, 1992 U. S. App. LEXIS 14580 (CA9) (unpub.); *Frierson v. United States*, 932 F. 2d 967 (CA6 1991) (unpub.); *United States v. Beale*, 921 F. 2d 1412 (CA11), cert. denied, 112 S. Ct. 264 (1991); *United States v. Maravilla*, 907 F. 2d 216, 229 (CA1 1990). I would grant certiorari to resolve this split between the Circuits.